

Memorandum

COPY

To: Phil Rassier
Thru: Dave Tuthill
CC: Gary Spackman, Nick Miller
From: Tim Luke. *TJL*
Date: June 16, 2006
Re: Request to Attorney General's Office to Appoint Legal Counsel for Bob Duke, Water District 34 Watermaster, Regarding IDWR Hearing on Petition to Remove Watermaster

This memo is a request to have IDWR make a formal request of the Idaho Attorney General's Office to appoint a Deputy Attorney General to represent Bob Duke, watermaster of Water District 34, Big Lost River and tributaries, at an upcoming IDWR hearing regarding a petition from water users to remove Mr. Duke as watermaster of the water district. The hearing is being scheduled for July 11 and 12, 2006, in Mackay, Idaho.

IDWR received a petition on March 17, 2006 from water users in the district to remove the watermaster pursuant to Idaho Code § 42-605. This statute requires IDWR to investigate complaints and hold a hearing on the petition. IDWR outlined a procedure of investigation and time frame for a potential hearing as per a letter to the petitioners dated March 30, 2006 (copy attached). This letter indicated that IDWR would determine whether legal counsel would be provided to Mr. Duke during the duration of the contested case. On April 21, 2006, IDWR sent a letter to Mr. Duke stating that IDWR determined that legal counsel would be provided to him if the matter resulted in a hearing (copy of letter attached).

The investigation steps outlined in IDWR's March 30th letter have been completed. IDWR has attempted to work through the relevant issues with the petitioners, the watermaster, and the water district advisory committee over the past several months. IDWR had hoped that the matter might be resolved and that the petitioners might withdraw their petition. On June 13, 2006, IDWR received a letter from the attorney representing the petitioners asking that IDWR proceed with the hearing. On June 16, 2006, Nick Miller of IDWR contacted Mr. Duke to confirm whether he wished to be represented by a Deputy Attorney General. Mr. Duke confirmed that he would like to have legal counsel provided by the AG's office.

Given IDWR's commitment to Mr. Duke via the correspondence dated April 21, 2006, and Mr. Duke's interest in receiving the legal representation, IDWR staff asks that IDWR formally request the AG's office to appoint an attorney to represent Mr. Duke at the hearing.

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June 13, 2006

VIA FACSIMILE & REGULAR MAIL

Nick Miller
Water Distribution Section
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098
Fax No.: 208-287-6700

Re: IDWR Recommendations for Operation of Water District No. 34, Big Lost River
Your Letter Dated May 19, 2006.

Dear Mr. Miller:

We have been asked to write this letter in response to your request of May 19, 2006. We wish first to express appreciation to you and other officials of IDWR, including the director, for your prompt and diligent response to the matters raised in our initial letter of March 17, 2006. We also want to assure that we are in complete agreement with most of the proposals and suggestions you have made.

Having said that, we need to point out that we do not agree that lack of knowledge regarding rules of water delivery in Water District 34 or lack of knowledge of how Water District 34 operates is either an accurate characterization of the underlying source of the trouble in Water District 34, or that saying so will do much to address the misperformance of watermaster duties and paucity of complete and accurate records. While we do not disagree that many, probably most, water users do not possess more than a very elementary knowledge, at best, of the applicable rules and district operation, there are nevertheless a good number of water leaders in the basin who possess a quite substantial and thorough knowledge and understanding of such matters.

The problem that needs to be addressed is that the watermaster and his staff have not been adequately performing his statutory duties for a long time, and thus far we have seen no evidence

Nick Miller
Water Distribution Section
Idaho Department of Water Resources
June 13, 2006
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that he will do so in the future. We have previously expressed that our main objective is not removal of Bob Duke as watermaster; rather, it is that the duties of the Water District 34 watermaster be strictly, diligently and thoroughly performed in accordance with the requirements of the statutes and applicable rules. There exists a continuing and intensifying dispute of long duration between water users in the upper portions of Basin 34 and those in the lower basin. There is pending district court litigation between these factions in which IDWR is or probably soon will be, directly involved as a party. To the extent the watermaster and the manager of the irrigation district continue to favor and do the virtual bidding of the upper basin interests, our clients will actively and adamantly continue to seek the removal of the watermaster.

You are personally aware of the most recent difficulties experienced by the recharge committee for this basin in attempting to persuade the watermaster to deliver available water supplies for such recharge. Instead, he and the manager of Big Lost River Irrigation District seemed to insist on characterizing the extra water supplies as "free water" that they can deliver to the water users to whom they are personally loyal, without any accounting. We insist this practice be stopped and corrected.

There is but one source to look for fairness and correct legal administration to be enforced. It is not the advisory committee. That committee is composed of water users from both factions and it has no legal authority to do much beyond advise. As we understand the law in Idaho, we must look to the director of IDWR to instruct, educate and direct the watermaster and to enforce the requirements of the statutes and rules. Without the very direct and diligent involvement of IDWR personnel in the ongoing duties of the Water District 34 watermaster and his staff, we do not expect any better performance than previously. Thus far, we have observed nothing to convince us there has been any appropriate change. The only report we have seen (on recharge) is essentially non-responsive and contains little helpful information.

To our knowledge, there has not yet been any "random verification of reported diversion measurements this season". We still believe this is absolutely necessary. We agree there is a high level of mistrust and we think the answer is a fairly high degree of oversight, at least during the initial training and education period.

We continue to believe this effort could be augmented by designating a qualified independent consultant. We would be happy to submit names, but we need some assurance that IDWR will deputize him with adequate authority to access the places he needs to go. We also believe the district ought to fund this effort. Our clients are as concerned about budgeting as anyone. But reasonable expenditures for such services will, in our opinion, pay long term dividends in ensuring accuracy and proper administration, which, in time will reduce mistrust.

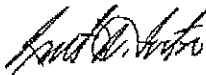
Nick Miller
Water Distribution Section
Idaho Department of Water Resources
June 13, 2006
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Whether additional assistance is necessary, we cannot say. We generally feel that the water users are willing to adequately fund whatever IDWR determines to be reasonably necessary.

At this point, we think there should definitely be a hearing and that a main item of that hearing should include the submission by the watermaster of his written plan to comply with the recommendations and requirements of IDWR. It should include written documentation of what has been done and measurements kept to date. We are well into the irrigation season and have a great concern that we may soon find ourselves with one more year of inadequate records for assessment and voting purposes.

We will look forward to your continuing attention to this matter.

Yours very truly,



Kent W. Foster

c: Gary Spackman
Tim Luke

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State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 21, 2006

BOB DUKE
WATERMASTER, WATER DISTRICT NO. 34
PO BOX 53
MACKAY, ID 83251-0053

Re: Water District 34 – Counsel for Watermaster

Bob,

In a letter dated March 30, 2006, Gary Spackman indicated that, prior to the Water District 34 Advisory Committee meeting anticipated for the end of April, the Department would determine whether legal counsel would be provided for you in the matter of the request that you be removed as watermaster. As outlined in Mr. Spackman's letter, the Advisory Committee meeting may provide an opportunity to resolve some of the issues behind the removal request and potentially obviate the need for a hearing. The Department has determined that legal counsel at the Advisory Committee meeting is unnecessary. However, the Department has determined that legal counsel will be provided for you if the matter results in a hearing.

Please call if you have questions.

Sincerely,

Nick Miller
Water Distribution Section

cc: IDWR Eastern Region, Idaho Falls
Loy Pehrson, WD34 Advisory Committee Chairman – Rt 1 Box 48, Darlington, ID 83255
Kent W Foster - Holden Kidwell Hahn & Crapo, 1000 Riverwalk Dr. Ste 200, Idaho Falls, ID 83402

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State of Idaho

DEPARTMENT OF WATER RESOURCES

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March 30, 2006

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

KENT W FOSTER
HOLDEN KIDWELL HAHN & CRAPO
1000 RIVERWALK DR STE 200
IDAHO FALLS ID 83402-3304

BOB DUKE
WATERMASTER
WATER DISTRICT 34
PO BOX 53
MACKAY ID 83251-0053

Re: Request to Remove Watermaster of Water District no. 34, Big Lost River

Dear Mr. Foster and Mr. Duke:

This letter acknowledges receipt of a letter from Kent Foster to Karl Dreher, the Director of the Idaho Department of Water Resources (IDWR), dated March 17, 2006. The letter requests, on behalf of several Big Lost River water right holders, "the investigation by the Director contemplated by subparagraph (9) of Idaho Code, § 42-605, any hearing that may be deemed necessary by the Director, and ultimately, the removal of the Watermaster elected at said annual meeting."

IDWR interprets the letter as a request to remove Bob Duke, recently elected Watermaster for Water District no. 34, Big Lost River. Idaho Code § 42-605 requires that the Director hold a hearing when he receives a request to remove the watermaster. Following a hearing, IDWR is required to render a decision. Because a hearing and a decision are required, the request for removal creates a contested case before IDWR.

The Director asked that I recuse myself from any direct factual investigation or any discussions of specific facts with the water users in Water District no. 34 or IDWR staff, anticipating I will be appointed as the hearing officer for the contested case. The requested investigation will be conducted within the context of the contested case so all parties can be assured the hearing officer is not participating in any fact finding or factual review during the investigation. Nick Miller, an IDWR engineer, will be the IDWR contact person during the investigation.

In addition to the express directive in Idaho Code § 42-605 that the Director conduct an investigation, the hearing officer in a contested case also has the authority to request staff memorandum from IDWR employees. Because I anticipate being appointed as the hearing officer, I will request staff memorandum that explains and summarizes the investigation. I expect IDWR to conduct the investigation as follows.

- April 7, 2006 – Deadline for Nick Miller, to meet with Bob Duke to review the water district records and identify water delivery and accounting issues.
- End of April 2006 – IDWR will meet with the Water District no. 34 Advisory Committee and other concerned water users to review water measurement and regulation records, measurement and regulation record evaluations, accounting computations, and other related information. The purpose of the meeting is to discuss information gathered during the Department's initial review of Water District records and to seek input and analysis from the advisory committee and other concerned water users. The Director has expressed a preference for holding this meeting in Boise. Prior to this meeting, the Department will determine whether legal counsel will be provided for Bob Duke during the duration of the contested case.
- May 15, 2006 – IDWR will complete and distribute a staff memorandum summarizing its investigation.

After submittal of the staff memorandum, I will conduct a one-day hearing during June 6-9, or June 13-16, 2006. The hearing will be conducted in the Big Lost River Basin. Please identify days within this time period that you will not be available. I will send out a notice of hearing and an order appointing me as the hearing officer following the receipt of your unavailable dates.

I encourage you and all water users within the Big Lost River Basin to participate in the dialogue during IDWR's investigation. Perhaps discussions between the waterusers, the watermaster, and IDWR can resolve issues presently in dispute, reduce the number of issues that must be resolved at the hearing, or completely obviate the need for a hearing.

Sincerely,



Gary Spackman

- c. Water District 34 Advisory Committee Members
Big Lost River Irrigation District
IDWR – Eastern Region
Nick Miller, Water Distribution

See: WD 34-2006 file in Water Distribution's files in the vault.

Messrs. Foster & Duke
March 30, 2006
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Big Lost Irrigation District:

Attn: Bob Shaffer, P.O. Box 205, Mackay, ID 83251-4800

Water District No. 34 Advisory Committee members & their addresses.

Loy Pehrson – Rt 1 Box 48, Darlington, ID 83255
Lin Hintze – PO Box 125, Mackay, ID, 83251
Logan Williams – HC 86 Box 4160, Mackay, ID 83251
Kieth Hill – Mackay, ID 83251
Preston Bell – RT 1 Box 58, Darlington, ID 83231
Alvin Crawford – 3943 W Antelope Rd, Moore, ID 83255
Jay Jensen – 3165 W 3300 N, Moore, ID 83255
Bob Waddoups – 3474 W 2850 N, Moore, ID 83255
Eric Aikele – 3477 W 2700 N, Moore, ID 83255
Young Harvey Walker – Rt 1 Box 200, Arco, ID 83213
Mitchell Sorenson – 3871 W 2500 N, Moore, ID 83255
Richard Reynolds – 2800 N.3233 W, Arco, ID 83213
Darrell McDonald – PO Box 102, Arco, ID 83213-0102
Seth Beal – 2827 N 3375 W, Moore, ID 83255